FILE COPY

OCT 18 1946

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 543

FEDERAL POWER COMMISSION, *et al.*,
Petitioners,

v.

ARKANSAS POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR THE RESPONDENT IN OPPOSITION

P. A. LASLEY, Esq.,
Pyramid Building,
Little Rock, Arkansas.

GORDON E. YOUNG, Esq.,
806 Timmons National Bldg.,
Pine Bluff, Arkansas.

Of Counsel for Respondent:

BRIDGES, BRIDGES, YOUNG & GREGORY,
Pine Bluff, Arkansas.

REID & PRIEST,
Two Rector Street,
New York 6, N. Y.

A. J. G. PRIEST, Esq.,

SIDMAN I. BARBER, Esq.,
Two Rector Street,
New York 6, N. Y.

Counsel for Respondent.

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
REASONS FOR DENYING THE WRIT	7
The Myers and Macauley cases	7
Controversy not within administrative ambit	10
Actual and substantial controversy exists	11
First Iowa case not applicable here	13
NARUC Bulletin misapprehends scope of opinion	16
CONCLUSION	17
APPENDIX A, DECLARATORY JUDGMENT ACT	i
APPENDIX B, EXCERPTS FROM FEDERAL POWER ACT	ii
APPENDIX C, EXCERPTS FROM ARKANSAS STATUTES	iv

CITATIONS

CASES:

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, (No. 603, October Term, 1945, decided April 29, 1946)	13
In the Matter of The Montana Power Company, 57 P. U. R. (NS) 193, 776	13
In the Matter of Northern States Power Company, F. P. C. 64 P. U. R. (NS) 257	12
Jersey Central Power & Light Co. v. Federal Power Commission, 319 U. S. 61, 68-88	14
Macauley v. Waterman Steamship Corp. (No 435, October Term, 1945, decided March 25, 1946)	7

PAGE

Maryland Casualty Company v. Pacific Coal & Oil Co., 312 U. S. 270 11

Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 7

Re The California-Oregon Power Company, 47 P. U. R. (NS) 193 13

TEXTS:

Borchard, Declaratory Judgments, 2nd Ed. pp. 900-901 11

STATUTES:

Act 324 of the General Assembly of Arkansas, 1935 (Approved April 2, 1935) Sections 8(a), 61 and 62 ..... 3, 4

Federal Power Act, 49 Stat. 838, 16 U. S. C. 792, et seq.

Sec. 301(a) 4, 7, 14, 16

Sec. 313(b) 7

MISCELLANEOUS:

Fed. Rules of Civil Procedures, Rule 57, 28 U. S. C. A. following Sec. 723(c) 9

National Association of Railroad and Utilities Commissioners, Bulletin 110, dated July 16, 1946 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 543

FEDERAL POWER COMMISSION, *et al.*,

Petitioners,

v.

ARKANSAS POWER & LIGHT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia (R. 48-63) is unreported.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, to review the judgment of the Court of Appeals entered June 28, 1946.

Question Presented

The question presented is neither adequately nor correctly stated by Petitioners. Their statement of the question errs in the following material respects:

(1) Its initial reference merely to "the proper amounts to be recorded in the accounts" (which might be special accounts for the information and purposes of the Federal Commission) diverts attention from the real issue as to control over the official corporate accounts[1] which "represent the actualities of the business" of Respondent. No question has been raised as to the right of the Federal Commission to a separate accounting for its own purposes.

(2) The recital that the Federal Commission has under consideration questions concerning amounts to be recorded seems misleading, since that Commission has disclosed its intent to exercise exclusive control over the Company's official corporate accounts, as to which the Arkansas Commission itself claims exclusive control (*infra*, pp. 11-13).

(3) The question stated omits reference to the jeopardy in which Respondent is placed by the conflicting claims of the Federal and State commissions. Respondent does not know which master it must serve as it has made and continues from day to day to make entries in its official corporate accounts under compulsion of the State Commission.

(4) The question presented by Petitioners does not clearly disclose that neither factual findings nor the exer-

---

[1] The official corporate accounts which are here involved were clearly characterized as follows by the court below:

> "There must always be an official recording of figures to represent the actualities of the business, to constitute the genuine record of stewardship, the basis upon which representations are made as to the real results of the utility's operations and its true financial condition in reports to stockholders and to the public, and in financial statements to be submitted to prospective investors or creditors. Merely to state this proposition is to demonstrate its soundness, since any reasonable mind immediately perceives that actual transactions can be truly reflected by only one set of figures. A differing set shows only a hypothetical situation, demonstrating the distinction between what is, and what might have been." (R. 50).

cise of administrative discretion can be involved.[2] The single question presented is a judicial question, the answer to which is dependent solely on the construction of the respective State and Federal statutes. Such a determination cannot be made by an administrative body. No order of the Federal Commission could limit or control the State Commission and no order of the State Commission could limit or control the Federal Commission.

Only slight paraphrasing of the language of the court below (R. 48-50) is required accurately to state the question presented as follows:

> Where a public utility company asserts its willingness to keep two differing sets of accounts in obedience to the dictates of the two Commissions (the Arkansas Public Service Commission and the Federal Power Commission) to which it is subject, but alleges that this will satisfy neither Commission, as each asserts the right to require the company to keep its official corporate accounts in the manner specified by it, and where the two Commissions insist on divergent and inconsistent action on the part of the company as to the same subject matter, is the company (having been placed in very real jeopardy) entitled, in a suit for a declaratory judgment, to a judicial determination as to whether the State Commission or the Federal Commission has exclusive regulatory control over its official corporate accounts?

Statutes Involved

The Declaratory Judgment Act is set forth in Appendix A infra. The relevant portions of the Arkansas Utility Act (Act 324 of 1935) are set forth in Appendix B, infra. The relevant portions of the Federal Power Act are set forth in Appendix C, infra.

---

[2] In this connection, the court below said, "As far as the declaratory judgment sought is concerned, the complaint does not challenge the correctness of, or justification for, any order of either commission with respect to the manner of recording transactions on the companies' books, or the allocation of items among prescribed accounts." (R., p. 49).

Statement

The only question decided by the court below was that of the jurisdiction of the District Court to determine a three-party controversy arising out of conflicting claims of the Petitioners on the one hand and the Arkansas Commission on the other. Each authority claims and asserts exclusive jurisdiction with respect to the same subject matter —Respondent's official corporate accounts.

The solution of the controversy and of the conflicting claims depends solely upon the proper construction of certain sections of the Federal Power Act and of the laws of the State of Arkansas. Neither the exercise of administrative discretion nor the consideration, weighing or balancing of any evidence is involved.

The Respondent, an Arkansas corporation, is a public utility within the meaning of Part II of the Federal Power Act and also within the meaning of Act 324 of the Acts of the General Assembly of Arkansas, approved April 2, 1935, and thus is subject, to the extent provided by said Acts, to regulation by the Petitioners and by the Arkansas Commission.

The jurisdictional claim of the Petitioners is based upon Section 301(a) of the Federal Power Act and that of the Arkansas Commission is based upon the proviso clause of said Section 301(a) and upon the Arkansas Act which confers comprehensive jurisdiction on that Commission.

As the court below said (R. 51), the Arkansas Commission on June 24, 1944 (Exhibit 2 to the complaint) "entered an exhaustive and carefully considered order. It determined that it had jurisdiction to prescribe the manner in which the company [Respondent] should keep its corporate books, accounts and records and that the books, records and

accounts prescribed by it should be the official corporate accounts and records. * * *"

The staff of the Federal Commission, after the date upon which the Arkansas Commission's order had become effective, re-examined Respondent's official corporate accounts and recommended that the Federal Commission require disposition of amounts in such accounts at variance with the treatment already given, and currently being given, those accounts under the mandate of the Arkansas Commission.

Although it had before it the Arkansas Commission's order, which had definitely claimed and exercised exclusive jurisdiction over Respondent's official corporate accounts and had prescribed a prudent investment rate base predicated upon the entries appearing in such accounts, the Federal Commission issued a supplemental order requiring Respondent to show cause why it should not make the adjustments in its official corporate accounts recommended by the Federal Commission's staff, which adjustments would be violative of the order of the State Commission. The text of the show cause order is reflected by Note 6 to the opinion below (R. 52).

After the issuance of this show cause order, the Arkansas Commission threatened to prosecute the Respondent under the provisions of the Arkansas statute and to enforce the penalties therein provided for any failure on the part of the Respondent fully to comply with all of the terms and conditions of the Arkansas order.

In an effort to resolve this jurisdictional dilemma, Respondent moved to dismiss the Federal Commission's show cause order on the grounds that its primary books of account are subject to the jurisdiction of the Arkansas Commission and that the exercise by the Federal Commission of the jurisdiction attempted to be exercised pursuant

to its show cause order would result in an irreconcilable conflict between the two regulatory authorities and would subject Respondent to penalties provided for in the Arkansas statute. As to this motion to dismiss, the Federal Commission has remained silent.

Realizing that its position is uncertain and perilous and that it will be forced to disobey one of the Commissions and to violate one of the two regulatory statutes, whatever course it may take, and prompted by a desire not to violate any law, Respondent complained to the District Court that the two regulatory bodies, by reason of their respective claims, have placed it in a vexatious and dangerous position. This suit to determine Respondent's rights and liabilities provides the two commissions with an appropriate forum in which to contest their respective conflicting claims of superior jurisdiction.

Both Commissions were made parties defendant. The relief sought is a declaratory judgment: (a) that the Federal Commission does not have the exclusive jurisdiction asserted by it over Respondent's official corporate accounts; (b) that the exclusive jurisdiction to regulate and supervise such accounts is vested in the Arkansas Commission; and (c) that, in the event it should be determined that the Federal Commission has the jurisdiction claimed by it, the Arkansas Commission does not have the jurisdiction which it claims and has exercised over said accounts.

The Arkansas Commission answered the complaint, claimed exclusive jurisdiction over said accounts, and admitted all of the allegations of the complaint, except that it denied that the Plaintiff, in any event, was entitled to a declaration that the Arkansas Commission had no jurisdiction over said accounts. That Commission also filed a cross-claim against the Federal Commission setting up its claim of exclusive jurisdiction and sought a declaration to that effect. Petitioners filed a motion to dismiss which was sus-

tained by the District Court upon the theory that Section 313(b) of the Federal Power Act provided the exclusive remedy for reviewing orders of the Federal Commission.

Upon appeal, the Court of Appeals for the District of Columbia held that an actual controversy (and justiciable issue) was disclosed, involving only a purely legal problem, that of interpreting the State and Federal statutes and determining which commission has exclusive control of the official corporate accounts in question, which entitled Respondent to a declaratory judgment. Accordingly, it reversed the order of the District Court with directions to deny the motion to dismiss and to proceed to determine the controversy.

Reasons for Denying the Writ.

The Myers and Macauley cases.

Petitioners place their principal reliance upon the opinions of this Court in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938) and *Macauley* v. *Waterman Steamship Corp.*, No. 435, October Term, 1945, decided March 25, 1946. But it is quite obvious that these cases are clearly distinguishable from the case at bar and therefore are neither controlling nor persuasive here.

Both the *Myers* case and the *Macauley* case involved findings of fact. The case at bar involves *no such finding.* Neither case presented conflicting claims of exclusive jurisdiction asserted by two warring regulatory agencies, each claiming supremacy in the same field and over the same subject matter. In each case, "coverage" of the respective acts depended solely upon the nature and character of the activities involved, while here the record disclosed a controversy which does not involve the nature or character of any activities, but rather conflicting interpretations of the two statutes under consideration, the State Commission claiming, under the Arkansas Regulatory Act and the proviso clause of Section 301(a) of the Federal Power Act

itself, the sole right to supervise and regulate Respondent's official corporate accounts, and the Federal Commission claiming, under the Federal Power Act, the same exclusive right.

In the *Myers* case, the shipbuilding company claimed it was not engaged in interstate commerce. This claim necessarily involved a *finding of fact* as to the nature, character and extent of the company's operations.

In the *Macauley* case, the steamship company claimed it had a contract with the British Government rather than with an agency of the United States. This claim required a *finding of fact* as to whether the contract was actually with the United States, although appearing on its face to have been made with the British Government. In both cases, jurisdiction depended upon findings of fact.

Here, the conflicting claims of the two commissions rest upon, and are determined by, a construction of related Federal and State statutes. There is no issue as to the nature, character or extent of Respondent's operations; there are no facts to find and there is no room for the exercise of administrative discretion. Both the *Myers* and the *Macauley* cases involved mixed questions of law and fact, while here there is a purely legal problem—construction of the statutes of two sovereigns, and a determination, under the harmonized statutes, that one commission or the other has the regulatory power claimed by both, and which only one can exercise.

Petitioners' statement (Pet. Br., 9) that the "opinion of the court below completely ignores this Court's decision in the *Myers* case and all but ignores the recent reversal by this Court of its decision in the *Waterman Steamship* [Macauley] case" is at least highly disingenuous. The *Myers* case is expressly referred to in the dissenting opinion of Judge Morris, who says, "It has been urged that the *Myers* case could be distinguished from the instant case

because of the explicit language in the National Labor Relations Act not found in the Federal Power Act." And in our briefs in the court below, we not only directed attention to the peculiar language of the Labor Relations Act by which the District Courts were stripped of all jurisdiction of every character over the enforcement of that Act, but also urged that the *Myers* case both was not brought under the Declaratory Judgment Act and was decided before the effective date of the new Federal Rules, Rule 57 of which provides that the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The opinion of the court below may not have referred specifically to the *Myers* case, but that case patently and obviously was considered by the court in arriving at its conclusion.

And the court below completely and conclusively distinguishes the *Macauley* case (R. 62, Note 17). Referring to the Federal Power Commission's argument that, because this Court had held in the *Macauley* case that the Tax Court, an administrative body, could construe the Renegotiation Act by deciding whether it applied to a given situation, the Federal Power Commission had the same right with respect to the Federal Power Act, the court below said:

> "* * * This argument overlooks the fundamental fact that something more is at stake here than merely to gauge the sweep of the federal statute. *For it is one thing for a federal administrative agency to rule as to the coverage of its own act when that act stands alone. It is quite another for the agency to decide whether its organic act over-rides the statute of a different sovereignty which already has been applied by the state authorities to the situation which the agency desires to control by applying the federal act. That is a task for the courts.* We do not understand Macauley case as extending to a federal agency the unprecedented power of exercising such a clearly judicial function." [Italics supplied.]

It is the *Macauley* case which, according to the Petitioners, the court below "all but ignores."!

Controversy not within administrative ambit.

The court below, in holding that the complaint stated an actual controversy, *did not ignore* the principle that provisions for appellate review of administrative action are exclusive. The court's opinion specifically recognized that principle (R., p. 61), but concluded that the pleadings did not present a controversy within the ambit of administrative action.

In reaching this conclusion, the court below took cognizance of the fact that here the principal controversy was between the two regulatory agencies, observing appropriately:

> "• • • Even if it be said that the Federal Power Commission has the right to exercise the judicial function of interpreting its own organic act, it could hardly be added that that agency also possesses the exclusive right to interpret a statute of one of the States of the Union, and to decide the relation between that state legislation and its own Act. This would be contrary to the purpose for which the Congress enacted the Federal Power Act, which was to supplement, not supersede, the regulatory power of the states."

The issue is not one which can arise only in or following an administrative proceeding. Indeed, the controversy between the two commissions exists independently of the Federal Commission's show cause order or of any final order which it may enter in the proceeding thereby initiated. It would exist if such proceeding were to be dismissed. Respondent patently cannot serve two masters in determining the entries to be made in its official corporate accounts. Each commission has declared in positive terms its intent to control such accounts. Each commission contends that it is enjoined by statute to regulate Respondent's official corporate accounts. The case at bar is not comparable to one in which the subject of regulation might or

might not come into existence, or the need of regulation might not arise, since it may not be assumed that either commission would consider itself free to disregard a statutory duty.

Actual and substantial controversy exists.

Since the controversy is real and the case is concrete, the rule stated by this Court in *Maryland Casualty Company* v. *Pacific Coal & Oil Company, et al.*, 312 U. S. 270, 273, (1941) applies:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. • • •"

See also *Borchard, Declaratory Judgments*, 2nd Ed., pp. 900-901.

Petitioners urge at some length (Pet. Br., 15-17) that there was no actual or immediately threatened invasion of the legal rights of either the Arkansas Commission or the Company, in the absence of which "a case or controversy" could not exist. This issue is dealt with definitively in the opinion of the court below (R. 58-60), the court's abundantly buttressed conclusion having been:

> "• • • it would be unrealistic to entertain any doubt as to whether the federal commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission."

But if there previously had been any possible shadow of doubt as to the Federal Commission's position, that shadow

was wholly dispelled by its Opinion No. 138, *In the Matter of Northern States Power Company,* entered on July 3, 1946, in which that Commission asserts with all possible vigor that it, rather than any state tribunal, has complete and exclusive jurisdiction over the official corporate accounts of every public utility and licensee subject to its authority. In its *Northern States* opinion, the Federal Commission said:

> "The question which may arise by reason of the language used in Applicant's reservation is whether our accounting requirements control the fundamental or basic corporate books of account of a public utility or licensee. * * * Awareness of the foregoing fact [a self-serving and unwarranted conclusion on the part of the Commission] caused Congress to provide that our accounting authority be comprehensive and extend to the basic books of accounts of public utilities and licensees. * * *"

We are wholly in disagreement with this determination by the Federal Commission, but it could hardly have taken a more positive or unequivocal stand. And we are amazed at the failure of counsel to call the opinion in question to the attention of this Court.

Petitioners seek to create the impression that upon examination of the facts, they may not seek to direct any disparate entries in the official corporate accounts of the Respondent. But Petitioners have confirmed the charge that they will adopt a course in serious conflict with that adopted by the State Commission. Each system of accounts provides for the establishment in Account 100.5 of the difference between the original cost of electric plant acquired as an operating unit or system and the actual, bona fide cost thereof to the accounting utility. (Exhibit 1, p. 25; and Exhibit 4, p. 19). It is admitted that Respondent's general corporate books include in plant account a large amount of such excess costs. (Joint Appendix, p. 7, par. 12 and Ex-

hibit 2 to Complaint). The State Commission has ordered that such difference of more than $6,000,000 be retained in Respondent's accounts. Petitioners have declared that the Federal Commission cannot, in accordance with its system of accounts, permit such retention but must compel amortization or other disposition.[3] In *every* similar proceeding before it in which an amount was established in Account 100.5, the Federal Commission has ordered a disposition of the amounts there recorded.

First Iowa case not applicable here.

The case at bar is clearly distinguishable from *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, No. 603, October Term, 1945, decided April 25, 1946, in which this Court held that the Federal Power Commission and other representatives of the Federal Government exercise comprehensive control over the development of the navigable waters of the United States, to the exclusion of state authority. Emphatically to the contrary, the Federal Power Act does not confer upon the Federal Commission exclusive or any authority over the official corporate accounts of public utilities if such accounts are required to be kept under and by authority of the laws of any state. Respondent is an Arkansas corporation, transacting substantially all of its business within that state and deriving more than 98% of its revenues from intrastate, as dis-

---

[3] Thus, in its opinion in *Re The California Oregon Power Company*, 47 P. U. R. (NS) 193, the Commission said: "'Except for fictitious or paper increments, which should be charged off at once (American Teleph. & Teleg. Co. v. United States [1936], 299 U. S. 232, 240, 81 L. ed. 142, 16 P. U. R. (NS) 225, 57 S. Ct. 147), provision in advance of retirement should be made. In fact, such provision is mandatory under our, and most, if not all, systems of accounts. In practice, tangible plant assets are generally depreciated, whereas intangible assets are amortized. Accordingly, amounts in Account 100.5 should either be charged off immediately or spread over a reasonable period of time, if proper public utility accounting practices are to prevail.'"

Again, *In the Matter of The Montana Power Company*, 57 P. U. R. (NS) 193, 226, the Commission said: "Consistent with our action in similar cases heretofore decided, therefore, we reject Respondent's contention that the amounts should be kept in the accounts indefinitely without diminution by amortization or otherwise."

tinguished from interstate, sources (R. 51). Detailed citation of the legislative history of Part II of the Federal Power Act probably is not necessary in this connection, but that history is filled with assertions on the part of sponsors and proponents of this legislation to the effect that the new authority conferred upon the Federal Power Commission was *"conceived entirely as a supplement to and not a substitute for state regulation"*; that the policy of Congress was *"not to impair or diminish the powers of any state commission"*; that *"the bill takes no authority from state commissions"* and that *"Probably no bill in recent years has so recognized the responsibilities of state regulatory commissions."*[4]

To contend that the *First Iowa* case is controlling here overlooks the real issue in this litigation—the very basis of the claim of the Arkansas Commission. While Section 301 (a) of the Federal Power Act contains rather broad language giving the Federal Commission jurisdiction over accounts and accounting records, the proviso clause of that section, by its express terms, takes from the Federal Commission jurisdiction over "any accounts, memoranda or records which a public utility may be required to keep by or under authority of the laws of any state."

Therefore the extent and limit of the Federal Commission's jurisdiction over any accounts of a public utility can only be determined by exploring the applicable state statute and determining its actual effect. The proviso clause becomes operative only when particular accounts or records are required to be kept by or under the authority of a state. Its then effect is to withhold from the Federal Commission jurisdiction over any such accounts or records. And here it obviously is not possible to reconcile the conflicting claims of the two warring commissions without

---

[4] *Jersey Central Power & L. Co.* v. *Federal Power Commission* (Diss. Op.), 319 U. S. 61 (1943), at pp. 85-88.

construing and determining the effect of the Arkansas statute under consideration. In no other case have State and Federal regulatory authorities asserted conflicting jurisdiction over the same official corporate accounts.

In the *First Iowa* case, this Court held that the effect of Section 9(b) of the Federal Power Act, thought to have left some control over hydro-electric projects with the states, had no such effect. The Court said: "The entire section is devoted to securing adequate information for the Commission as to pending applications for licenses. • • • It does not itself require compliance with any state laws." Thus the jurisdiction of the Commission over hydro-electric projects is determinable within the four corners of Part I of the Federal Power Act, and does not require the construction of any state statute, as in the case at bar.

As observed by the court below (R., 62), "Even if it be said that the Federal Power Commission has the right to exercise the judicial function of interpreting its own organic act, it could hardly be added that the agency also possesses the exclusive right to interpret a statute of one of the States of the Union and to decide the relation between that state legislation and its own Act."

The petition for certiorari rests upon the claim that no determination of Respondent's rights or liabilities can be made unless the Commission has first passed upon the question, even though the single question involved is purely judicial. The general rule requiring exhaustion of an administrative remedy is, basically, a rule of expediency, designed to permit a governmental agency to proceed with its administrative duties without undue delay. It is not intended to delegate the judicial function, and has application only when a ruling upon "coverage" is incidental to a discharge of special administrative duties. Respondent's application to a court for determination of a controversy which a judicial tribunal alone could decide did not stay

or interfere with Federal Commission's proceeding to reclassify amounts under its system of accounts.

We do not understand the holding in the *First Iowa* case that the Federal Commission "would have been justified in following its own interpretation of the Federal Power Act" to be the equivalent of a ruling that an interpretation by that Commission would have the force or effect of a judicial determination, much less that all courts must decline to discharge the judicial function of construing a statute until the Commission has spoken.

N. A. R. U. C. bulletin misapprehends scope of opinion.

The bulletin of the National Association of Railroad and Utilities Commissioners relied upon by Petitioners (Pet. Br., 18-19) apparently misapprehends the scope of the opinion of the court below. The bulletin asserts that any proceedings "where a state commission claims jurisdiction over any extension, or service, or over rates for any service, or with respect to any matter of regulation, to the exclusion of the F.P.C. * * * will give rise to a very considerable volume of Declaratory Judgment Act litigation."

On the contrary, it is respectfully urged that, in each of the circumstances enumerated, the jurisdiction of the Federal Commission would have to be determined on the basis of factual findings, as was true in the *Myers* and *Macauley* cases, and that, therefore, there would be no occasion for invoking the Declaratory Judgment Act. Section 204(f) and the proviso clause of Section 301(a) of the Federal Power Act respectively withhold from the Federal Commission jurisdiction over the issuance of securities and over official corporate accounts, if and when a State regulates the issuance of the former or requires the latter to be kept under its authority. It is only under *these provisions* of the Federal Power Act that the solution of a conflict or uncertainty as to jurisdiction would depend exclusively upon stat-

utory construction and would, therefore, afford an opportunity for exercise of the judicial function under the Declaratory Judgment Act.

Conclusion

The opinion of the court below is so carefully considered, so closely reasoned, that it is difficult to understand Petitioners' suggestion that the court's judgment be reversed without further briefs or argument. No precedents are cited for this startling recommendation and we presume that none could be cited.

The controversy ultimately to be determined by the District Court upon the merits is one of major significance, but the quite narrow question of jurisdiction decided by the Court of Appeals patently is not one of general importance. The lower court's opinion has not decided a question of substance relating to the construction or application of the Constitution or a Federal statute which has not been, but should be, settled by this Court; nor is it in conflict either with a decision of a Circuit Court of Appeals or with an applicable decision of this Court. It merely determines that "the present case presents an unusually appropriate opportunity for the exercise of the judicial function in the manner contemplated by the Congress when it enacted the Declaratory Judgment statute." (R. 61).

For all the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

P. A. Lasley
Gordon E. Young
A. J. G. Priest
Sidman I. Barber
Counsel for Respondent.

APPENDIX A

Declaratory Judgment Act

(49 Stat. 1027, Judicial Code, § 274(d), 28 U.S.C.A. 400).

(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (Mar. 3, 1911, c. 231, § 274d, as added June 14, 1934, c. 512, 48 Stat. 955, and amended Aug. 30, 1935, c. 829, § 405, 49 Stat. 1027.)

APPENDIX B

Excerpts From the Federal Power Act

(49 Stat. 847, 854, 16 U.S.C.A. §§ 824, 825.)

§ 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale

of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. (16 U.S.C.A. § 824(a).)

§ 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof. (16 U.S.C.A., § 825(a).) (Emphasis supplied.)

§ 313. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the

Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). (16 U.S.C.A., §825 *l*.)

§ 315. (a) Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this Act or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this Act, or to appear by an

officer or agent at any hearing or investigation in response to a subpoena issued under this Act, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this Act but such forfeiture shall be in addition to any such penalty. (16 U.S.C.A., § 825n (a).)

§ 316. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, or any rule or regulation imposed by the Secretary of War under authority of Part I of this Act shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. (16 U.S.C.A., § 825o.)

APPENDIX C

Excerpts From Act 324 of the General Assembly of Arkansas (1935)

(Pope's Digest of the Statutes of Arkansas, §§ 2071, 2085, 2121, 2122.)

§ 8. (a) The Department herein created is hereby vested with the power and jurisdiction, and it is hereby made its duty to supervise and regulate every public utility in this Act defined, and to do all things, whether herein specifically designated, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.

(c) The Department is hereby empowered, after hearing and upon notice, to make, and from time to time, in like manner, alter or amend such reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and of the practice and procedure governing all investigations by, and hearings and proceedings before the Department, as it may deem proper and not inconsistent with this Act.

§ 22(a). The Department, by order, may establish uniform system of accounts to be kept by any public utility subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and the Department may prescribe the manner in which such accounts shall be kept.

§ 61. (a) Every public utility, and every person, or corporation, shall obey and comply with each and every requirement of this Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in the matters herein specified, or any other matter in any way relating to or affecting the business of any public utility, and shall do everything necessary or proper in order to secure compliance with, and observance of, every such order, decision, direction, rule or regulation by all officers, agents, and employees of every public utility.

(b) Any person or corporation which violates any provision of this Act or fails to comply with every lawful order, decision, direction, rule or regulation made or prescribed by the Department, or any part or provision thereof, shall be deemed guilty of a misdemeanor and upon conviction, subject to a penalty of not less than $100 nor more than $1,000 for each such offense.

§ 62. Each violation of any of the provisions of this Act or of any lawful order or rule of the Department, or any part or portion thereof by any corporation or person, is a separate and distinct offense, and in case of a continuing violation after a first conviction each day's continuance thereof shall be deemed to be a separate and distinct offense.